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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 149

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE COLORADO AND SOUTHERN RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the specially-constituted District Court for the District of Colorado entered in the above entitled case on April 29, 1949.

OPINION BELOW

The findings of fact, conclusions of law and judgment of the District Court (R. 241-264) are reported in 84 F. Supp. 134.

JURISDICTION

The judgment of the District Court was entered on April 29, 1949 (R. 263-264). The jurisdiction of this Court is invoked under the provisions of

Section 745 of the Bankruptcy Act of 1898 (Appendix, *infra* p. 31.)

QUESTIONS PRESENTED

On March 9, 1943, the specially-constituted District Court [1] by decree approved a plan of adjustment of the indebtedness of The Colorado and Southern Railway Company (hereinafter referred to as "taxpayer") under Chapter XV of the Bankruptcy Act. On that date there were no taxes owing to the United States, and the court so found. Future income and excess profits taxes for 1942 and 1943 could not be determined and assessed until after the taxpayer's returns for those years were filed, respectively, on or about March 15, 1943, and March 15, 1944. In 1946 the taxpayer was advised of a proposed assessment of taxes for 1942 and 1943, aggregating $3,001,061.75, plus interest. It petitioned the District Court to declare the Secretary of the Treasury estopped to assess the 1942 and 1943 taxes and to determine its correct tax liability for those years. The District Court assumed jurisdiction and decided that its former decree was *res judicata* (1) that no taxes were due for the year 1942 and (2) that certain data, computations, deductions and carryovers as reported in the taxpayer's 1940, 1941, and 1942 returns were correct and

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[1] Under Section 713 of the Bankruptcy Act (Appendix, *infra*, pp. 24-25), the special court consisted of three judges convened as provided in Section 266 of the Judicial Code, as amended. The nature of the special court is discussed in *Ackert* v. *Baltimore & O. R. Co.*, 115 F. 2d 455 (C. A. 4), certiorari denied, 311 U. S. 717.

consequently must be used in computing the 1943 tax liability. The questions are:

1. Whether the District Court had jurisdiction to render a judgment as to the taxpayer's liability for a proposed assessment of 1942 and 1943 taxes.

2. If it had jurisdiction to do so as to either or both years, whether the former decree is *res judicata* that the taxpayer owes no taxes for 1942 and that the data, computations, deductions, and carryovers shown on its returns for 1940, 1941, and 1942 were correct and must be used in computing tax liability for 1943.

STATUTES AND RULE INVOLVED

The relevant statutory provisions and rule are printed in the Appendix, *infra,* pp. 20-38.

STATEMENT

The findings of fact and conclusions of law of the District Court may be summarized as follows:

On November 9, 1942, taxpayer filed a petition for approval and confirmation of a plan of adjustment under Chapter XV of the Bankruptcy Act of 1898, as added by the Act of October 16, 1942, c. 610, 56 Stat. 787 (R. 241). A hearing was held thereon on March 3-4, 1943 (R. 247-248). The Secretary of the Treasury was given notice of the filing of the petition and of the date for hearing (R. 241-242). The petition alleged (R. 10, par. 23) that so far as the petitioner (taxpayer) had knowledge, the

United States was not a creditor of petitioner on claims for taxes and no claims for taxes were affected by the plan. The United States made an investigation before the hearing, filed no claims for taxes or other items, and did not appear at the hearing. (R. 243-244, 247.) On March 8, 1943, the court entered findings of fact, conclusions of law, and decree approving and confirming the plan of adjustment (R. 75-105), in which it made a finding that the United States is not a creditor of the petitioner (taxpayer) on claims for taxes and that it was not affected by the plan (R. 97). Among other things, the plan extended the dates of maturity of certain obligations of the taxpayer and of some of its subsidiary companies; reduced the interest rate on all mortgage bonds and made parts of the interest payable only if earned; deprived all stockholders of the right to dividends; restricted the earnings which could be used for capital expenditures; and provided for the application of all remaining income to reduce the taxpayer's indebtedness of about $45,000,000. The plan became retroactively effective on November 1, 1941, and was to remain in effect until November 1, 1954, if the taxpayer remained solvent and performed its obligations under the plan. (R. 80-95.)

Prior to the decree approving the plan, the taxpayer had filed its consolidated income and excess profits tax returns for the years 1940 and 1941 on March 14, 1941, and March 16, 1942, respectively. Neither return showed any tax liability. The Com-

missioner has never asserted, and does not now claim, deficiencies in taxes for these years. The returns for both years showed a certain amount as a net operating loss which could be carried over as a deduction in computing net income for the succeeding two years; and an amount as an unused excess profits credit which could be carried over and deducted in computing adjusted excess profits net income for the succeeding two years. (R. 242-243.) On March 12, 1943, the taxpayer filed amended income tax returns for 1940 and 1941, in which it showed an increase in the net operating loss carryover deductions for the ensuing two years (R. 244).

On March 15, 1943, after approval of the plan of adjustment, the taxpayer filed consolidated income and excess profits tax returns for 1942, showing no tax liability. On the returns deductions were made of the net operating loss carryovers and the unused excess profits credit carryovers as shown on the 1940 and 1941 amended returns, and a net operating loss and an unused excess profits credit were shown as carryovers for deduction in computing net income and excess profits net income for the following two years. Deductions for depreciation and retirements of road property and structures were claimed in 1942 on the same basis as in the 1940 and 1941 returns, and equity invested capital was computed on the same basis as in the 1940 and 1941 returns. (R. 244-245.) On August 13, 1943, the taxpayer filed an amended

consolidated income tax return for 1942, which still showed no tax liability, but in which the net operating loss carryover deduction for the following year and the unused excess profits credit carryover for the following two years were reduced (R. 246-247).

On March 15, 1944, the taxpayer filed consolidated income and excess profits tax returns for 1943, which showed an income tax liability of $3,264,470.45, which was paid, and no excess profits tax liability. Deductions were taken of the net operating loss carryover and unused excess profits credit carryover as shown on the 1942 amended return. Deductions for depreciation and retirements were taken and equity invested capital was computed on the same basis as in the former years. (R. 249-250.)

On September 17, 1946, the Internal Revenue Agent in Charge gave notice to taxpayer of proposed additional taxes aggregating $3,001,061.73, plus interest, for 1942 and 1943. The proposed assessments were based on reductions of the deductions claimed in the returns for depreciation and retirements of road property and structures, reductions of the net operating loss carryovers from 1940, 1941, and 1942, and reductions in the equity invested capital reported in the 1940, 1941, 1942, and 1943 returns, and in the unused excess profits credit carryovers from 1940, 1941, and 1942. The taxpayer filed a protest against the proposed taxes but no settlement was reached. (R. 251-252.)

On October 4, 1948, the taxpayer filed a supplemental petition with the special District Court, in which it prayed that the Secretary of the Treasury be held estopped to assess the proposed additional taxes and that it be adjudged that no taxes are due for the years 1942 and 1943 (R. 106-119). After hearing, the District Court held that it had jurisdiction over the subject matter of the petition in order to protect the taxpayer and its property against action inconsistent with the plan of adjustment and to protect the rights of the parties under the plan. The court stated as facts that in giving its approval to the plan it relied on the figures reported in the 1940, 1941, and 1942 returns as being correct; that had the United States informed it of the determined changes in these figures, it could not have approved the plan without drastic alterations; and that assessment and collection of the proposed 1942 and 1943 taxes would jeopardize the effective execution of the plan and be unjust to the parties to the plan. It held that the United States was a creditor for 1942 taxes at all times after December 31, 1942, and that it had a duty to claim the 1942 taxes before the decree approving the plan on March 8, 1943, or in any event within six months thereafter, so that the 1942 taxes, if found to be legally due, could have been provided for in a modification of the plan of adjustment, if found practicable, feasible, and financially advisable; that the court's decree of March 8, 1943, was an adjudication, binding on the United States, that no taxes

were due to the United States for the year 1942; and that the United States is estopped and barred from assessing and collecting any income or excess profits taxes for the year 1942. The court held further that the United States had the duty to present to the court, for consideration in connection with approval of the plan, any changes the Commissioner of Internal Revenue proposed to make on the returns for the years 1940, 1941, and 1942 in the methods of computing depreciation and retirement deductions and equity invested capital and in the net operating loss carryovers and unused excess profits carryovers there reported, which would increase the taxes thereafter to be paid; that having failed to do so, its decree was an adjudication that no changes in these items as reported on the 1940, 1941, and 1942 returns were to be made; that the United States is estopped to make any changes in these items; and that in determining the liability of the taxpayer for 1943 taxes there shall be used the amounts of equity invested capital, net operating loss carryover deduction from 1942, excess profits credit, and unused excess profits credit carryover from 1941 and 1942 as set out in paragraph 2 of its judgment entered April 29, 1949. (R. 258-263.)

REASONS FOR GRANTING THE WRIT

1. The District Court's judgment in this case raises questions which are of importance in the administration of the tax law. The court's as-

sumption of jurisdiction to render a declaratory judgment disposing of proposed assessments for taxes, which were not determinable under the revenue laws (see *infra*, pp. 13-14) until after the entry of the decree approving the plan, on the basis of the supposed *res judicata* effect of that decree, results in nullifying the provisions governing assessment of income and excess profits taxes in the Internal Revenue Code (see *infra*, pp. 13-14) and consequently disrupts the established administrative procedure in that respect. To protect the revenue, it is essential that this Court review the case so that the Commissioner of Internal Revenue may know finally whether the provisions of the revenue laws in respect of assessment of future taxes are not applicable in proceedings under Chapter XV and other related chapters of the Bankruptcy Act.

Furthermore, the judgment places upon the United States the apparent duty of appearing in proceedings in which it does not submit a claim and by which it is not affected, for the purpose of advising the court of any changes to be made by the Commissioner of Internal Revenue of matters reported in tax returns already filed which will affect the liability for taxes in future years, at penalty of being thereafter barred from making such changes. If such a rigorous duty is to be imposed on the Commissioner of Internal Revenue in proceedings where the United States is not a party, it should be declared by this Court.

While these two questions are not of continuing importance in connection with proceedings under Chapter XV of the Bankruptcy Act since that chapter is no longer in effect except in the case of proceedings initiated by the filing of a petition before November 1, 1945 (Sec. 755, Appendix, *infra*, p. 32), nevertheless the same questions may arise in other cases in which taxes become due after a plan of arrangement of indebtedness or a plan of reorganization has been approved or confirmed under other chapters of the Bankruptcy Act; for example, under Section 77 (11 U. S. C. 1946 ed., Sec. 205), dealing with railroad reorganizations; under Sections 101-276 (Chapter X) (11 U. S. C. 1946 ed., Secs. 501-676), dealing with corporate reorganizations; under Sections 301-399 (Chapter XI) (11 U. S. C. 1946 ed., Secs. 701-799) dealing with plans for arrangement of unsecured debts; and under Section 401-526 (Chapter XII) (11 U. S. C. 1946 ed., Secs. 801-926), dealing with plans for arrangement of debts secured by real property. The probable recurrence of the questions in proceedings under other chapters contributes to their importance and warrants authoritative determination by this Court.

The court's holding that its former findings of fact, conclusions of law, and decree, which stated only that the United States was not a creditor for taxes as of that date and was not affected by the plan (and thus was not a party thereto), were *res*

judicata as to liability for 1942 taxes not determinable until after its date and as to matters contained in returns already filed which affected the future 1943 tax liability is of importance in the administration of the tax laws generally. The holding would seem applicable to every kind of tax case, and, if followed, the result would be that neither the Commissioner for administrative purposes, nor other courts considering a taxpayer's liability for other tax years, could rely on the terms of the findings, opinion, and judgment as showing what matters relating to tax liability were adjudicated therein; instead they would have to ask the court which rendered such findings, opinion, and judgment for a declaratory judgment as to what matters were adjudicated by it. The inconvenience and error of any such rule are obvious. It would also seriously disturb the administrative process if the United States were to be considered estopped by a judgment to which it was not a party, as the court held here. Moreover, as will be developed, *infra*, pp. 17-18, in employing the doctrine of estoppel by judgment against the United States, which was not a party to the judgment, as to matters not in issue and not referred to in the previous findings of fact, conclusions of law, and decree, the District Court disregarded this Court's exposition of the law of estoppel by judgment in *Commissioner* v. *Sunnen*, 333 U. S. 591, 598. If the doctrine of *res judicata* is to be so changed, it may be done

only by this Court. Administrative necessity requires that this question be resolved.

Not only does the *res judicata* holding of the District Court bar the substantial taxes proposed for 1942 and 1943 ($3,001,061.73 plus interest of $960,818 computed to January 1, 1949) without there having been an adjudication on the merits that they are not due, but if the judgment goes unchallenged, it is apparent that the court will consider this judgment an authority for making similar declaratory judgments on the doctrine of *res judicata* in respect of the tax liability accruing for all years after 1943 during the life of the plan (1944-1945, inclusive). Thus, the United States may be deprived of its statutory rights to assess and collect the taxes due from this taxpayer during the high profit war years and thereafter without ever having a determination on the merits that the taxes are not legally due. The importance to the revenue of having the present decision reviewed is thus emphasized.

2. In assuming jurisdiction to entertain the supplemental petition and to adjudicate the taxpayer's liability for taxes for 1942 and 1943, the District Court erroneously disregarded or misconstrued controlling statutory provisions. This Court should review the case in order that these provisions of law may be applied properly.

On the date when the plan of adjustment was approved, the taxpayer's returns for 1942 had not

been filed and the last day on which they could be filed (March 15, 1943) had not arrived. Section 53(a)(1), Internal Revenue Code (Appendix, *infra*, p. 32). The Commissioner of Internal Revenue was not authorized to determine and assess any tax for 1942 until after the return was filed on March 15. See Sections 271, 275 (a), and 729 (a) of the Internal Revenue Code (Appendix, *infra*, pp. 33-34, 37). There is no provision in Chapter XV of the Bankruptcy Act which alters this procedure. Although Section 738 (Appendix, *infra*, p. 31) provides that an order approving the debtor's petition shall have the effect of an adjudication of bankruptcy for purposes of Section 274 of the Internal Revenue Code, Section 274 (a) (Appendix, *infra*, pp. 35-36) provides only that a "deficiency" determined by the Commissioner shall be immediately assessed upon an adjudication of bankruptcy of the taxpayer. The section refers to deficiencies determined prior to the adjudication and in Chapter XV cases prior to the order approving the petition. Here it was not possible for the Commissioner to have determined a "deficiency", as defined in Section 271, for 1942 until after the return had been filed on March 15, 1943. Similarly, no "deficiency" for 1943 could be determined by the Commissioner until after the returns for that year had been filed on March 15, 1944, which was approximately a year after the plan of adjustment had been approved by the court. Thus, the proposed taxes for 1942 and 1943 could not even have

been determined prior to the filing of the returns and the District Court's holding that the United States became a creditor on December 31, 1942, for all 1942 taxes disregards the provisions of the Internal Revenue Code just discussed. Cf. concurring opinion of Judge Symes. Indeed, it may be doubted that the proposed taxes could be regarded as debts due the United States prior to their assessment which has been prevented by the judgment herein. Cf. Section 274 (a), Internal Revenue Code.

After entry of its decree approving the plan, the jurisdiction of the special court, as defined in Section 746 of the Bankruptcy Act (Appendix, *infra*, pp. 31-32), is to protect and enforce the rights of parties under the plan and the orders of the court thereon, if the court retains such jurisdiction in its final decree. The special court in this case erroneously construed this limited jurisdiction as including the power to adjudicate taxes accruing against the debtor in the normal course of business after approval of the plan. Such taxes are not affected by the plan and the plan is not binding as to them (see Sections 706 and 725 (Appendix, *infra*, pp. 20, 26-29)). It follows that the jurisdiction to protect the rights of parties to the plan does not extend to later tax claims which have no connection with the plan or the rights of parties under it. They arise from business transactions not controlled by the plan and, as to 1943, occurring for the most part after the plan had been adopted. Cf. *In re Lehigh*

Valley R. Co., 41 F. Supp. 97 (E. D. Pa.) in which a special court constituted under Chapter XV of the Bankruptcy Act held that it had no jurisdiction over a petition to require an attorney, claiming a fee in connection with a Mixed Claims Commission award, to have his claim adjudicated by the special court where the plan, which was prepared and filed before the award was made (see prior opinion in 34 F. Supp. 750 (E. D. Pa.)), did not deal with the award or the attorney's fee to be paid. The assumption of jurisdiction over subsequently arising tax liability is particularly unwarranted because it interferes with the jurisdiction of other tribunals. Under Section 272 (a) of the Internal Revenue Code (Appendix, *infra*, pp. 34-35) upon receipt of formal notice of deficiencies the debtor could have contested in the Tax Court the validity of the proposed assessment, or after paying the tax could have sued to recover it in the Court of Claims or the appropriate District Court. Section 738 of the Bankruptcy Act gives the special court power to determine the amount and legality of claims of the United States for taxes and to order payment thereof but this patently refers to taxes due or assessed under Section 274 (a) of the Internal Revenue Code before the plan has been confirmed, since Section 746 defines the limits of the court's jurisdiction after that time.

The special court attempted to sustain its jurisdiction as to both 1942 and 1943 on the theory that its decree approving the plan was *res judicata* of matters requiring the conclusion that the proposed taxes for those years were not due. In so doing it rendered a declaratory judgment in respect of federal taxes contrary to 28 U. S. C., Sec. 2201 (Appendix, *infra,* pp. 37-38). Since the 90 day notice of deficiencies as provided in Section 272 (a) of the Internal Revenue Code had not been sent to the taxpayer, and the taxes had not been assessed, the proposed taxes were in a preliminary administrative stage only and were not yet justiciable. Instead of leaving the question of whether its former decree was *res judicata* of the proposed 1942 and 1943 taxes to be settled by the proper tribunal when the proposed tax liabilities had progressed to a justiciable stage, the special court declared that its former decree was conclusive as to liability for the proposed taxes. That this amounts to a declaratory judgment is apparent, and particularly as to 1943. For that year the special court declared its former decree *res judicata* of the correctness of certain items as reported in the returns for 1940-1942, inclusive, and directed that these figures must be used by the United States in computing the tax liability for 1943.

3. The District Court's application of the doctrine of *res judicata* in this case is in substantial

conflict with *Commissioner* v. *Sunnen,* 333 U. S. 591. In that case this Court stated (p. 598) that a judgment in a prior cause of action will operate as an estoppel against the parties to the action only as to matters in issue or points controverted upon the determination of which the judgment was rendered. Here the debtor's petition for approval of its plan of adjustment of indebtedness filed November 9, 1942, alleged that the United States was not its creditor on claims for taxes and that no claims for taxes were affected by the plan. This allegation was not controverted by the United States, since it filed no claims for taxes and did not enter an appearance in the proceeding. In its findings of fact, conclusions of law, and decree entered March 8, 1943, the District Court found therefore that the United States was not a creditor for taxes (as of that date) and that it was not one of the claimants affected by the plan. Despite the facts that the United States was not a party to the proceeding and that the only matter put to the court, and to all indications decided in the early decree, was whether the United States was a creditor for taxes at that time, the District Court held that the decree was *res judicata,* that there was no liability for the 1942 tax which first became determinable by the Commissioner after the date of the decree,[2] and

---

[2] It has already been shown that the special court erroneously held that the United States became a creditor for the

that the data and computations reported in the 1940, 1941, and 1942 returns in so far as they affected 1943 tax liability were correct. The conflict with the rule stated in the *Sunnen* case is apparent. The application of *res judicata* is especially unjust since the early findings, conclusions, and decree contain nothing to suggest to the Commissioner, who was not a party and did not appear at the hearing, that the court was determining the liability for 1942 taxes which were not then due or was approving figures and computations in the returns already filed for use in computing the future 1943 tax liability. The doctrine of *res judicata* has the purpose of preventing a relitigation between the same parties of the same claim or issue. Here the special court applied the doctrine to prevent even a first litigation of the 1942 and 1943 tax liability between the United States and the taxpayer.

1942 taxes on December 31, 1942. This erroneous view was the principal reason for concluding that its decree of March 8, 1943, was *res judicata* that no tax for 1942 was due. But the court premised its holding of *res judicata* as to 1942 alternatively on the failure of the United States to apply for a revision of the decree to show the 1942 liability within six months thereafter under Rule 60 of the Federal Rules of Civil Procedure (Appendix, *infra*, p. 38). But Rule 60 was erroneously used by the court to bolster its decision. Even assuming, *arguendo* only, that it is pertinent in connection with a decree approving a plan of adjustment under the Bankruptcy Act, the circumstances for its application are not present in this case. The United States was not a party to the proceeding in which the decree was rendered, there was no judgment against the United States, and in any event the finding that the United States was not a creditor for taxes on March 8, 1943, was not the result of mistake, inadvertence, surprise, or inexcusable neglect, so as to permit a motion for relief from the decree under the rule.

CONCLUSION

Since the judgment of the special court raises important administrative questions, and since it is erroneous, is in disregard of controlling provisions of law, and is in conflict with a decision of this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949.

APPENDIX

Bankruptcy Act of 1898, c. 541, 30 Stat. 544: Chapter XV—Railroad Adjustments, as added by Act of October 16, 1942, c. 610, 56 Stat. 787:

SEC. 700. In addition to the jurisdiction otherwise exercised, courts of bankruptcy shall exercise original jurisdiction, as provided in this chapter, for postponements or modifications of debt, interest, rent, and maturities or for modifications of the securities or capital structures of railroads.

SEC. 705. The following terms, as used in this chapter, unless a different meaning is plainly required by the context, shall be construed as follows:

* * * * *

(4) "Creditors" shall include all holders of claims, demands, and obligations of whatever character against the petitioner or its property, whether or not such claims would otherwise constitute provable claims in bankruptcy, including the holders of claims made, assumed, or guaranteed by the petitioner.

* * * * *

SEC. 706. No creditor shall be deemed to be "affected" by any plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor.

SEC. 710. Any railroad corporation not in equity receivership or in process of reorgani-

zation under section 77 of the Bankruptcy Act at the time of filing its petition hereunder, and which has not been in equity receivership or in process of reorganization under said section 77 within ten years prior to the filing of such petition, which shall have—

(1) prepared a plan of adjustment and secured assurances satisfactory to the Commission of the acceptance of such plan from creditors holding at least 25 per centum of the aggregate amount of all claims affected by said plan of adjustment (including all such affected claims against said corporation, its parents, and subsidiaries); and

(2) thereafter obtained an order from the Commission (but not of a division thereof) under section 20a of the Interstate Commerce Act authorizing the issuance or modification of securities (other than securities held by, or to be issued to, Reconstruction Finance Corporation) as proposed by such plan of adjustment as filed, or as modified by, or with the approval of, the Commission, such order of the Commission to include also specific findings—

(a) that such corporation is not in need of financial reorganization of the character provided for under section 77 of this Act;

(b) that such corporation's inability to meet its debts matured or about to mature is reasonably expected to be temporary only; and

(c) that such plan of adjustment, after due consideration of the probable prospective earnings of the property in the light of its earnings experience and of such changes as may reasonably be expected—

(i) is in the public interest and in the best interests of each class of creditors and stockholders;

(ii) is feasible, financially advisable, and not likely to be followed by the insolvency of said corporation, or by need of financial reorganization or adjustment;

(iii) does not provide for fixed charges (of whatsoever nature including fixed charges on debt, amortization of discount on debt, and rent for leased roads), in an amount in excess of what will be adequately covered by the probable earnings available for the payment thereof;

(iv) leaves adequate means for such future financing as may be requisite;

(v) is consistent with adequate maintenance of the property; and

(vi) is consistent with the proper performance by such railroad corporation of service to the public as a common carrier, will not impair its ability to perform such service:

Provided, That in making the foregoing specific findings the Commission shall scruti-

nize the facts independently of the extent of acceptances of such plan and of any lack of opposition thereto: *Provided further*, That an order of the Commission (or of a Division thereof) under section 20a of the Interstate Commerce Act, made prior to the effective date of this chapter, authorizing the issuance or modification of securities as proposed by a plan of adjustment (other than securities held by, or to be issued to, Reconstruction Finance Corporation), shall be effective for the purpose of this subparagraph (2) of the first sentence of section 710, notwithstanding failure to include therein the foregoing specific findings, if such order did include the specific findings that such proposed issuance or modification of securities is compatible with the public interest, is consistent with the proper performance by the railroad corporation of service to the public as a common carrier, and will not impair its ability to perform such service; and

(3) secured assents to such plan of adjustment or such plan of adjustment as modified by, or with approval of, the Commission, by creditors holding more than two-thirds of the aggregate amount of the claims affected by said plan, which two-thirds shall include at least a majority of the aggregate amount of the claims of each affected class, may file in the United States district court in whose territorial jurisdiction such railroad corporation has had its principal executive or principal operating office dur-

ing the preceding six months or a greater period therof, its petition averring that it is unable to meet its debts, matured or about to mature, and desires to carry out the plan of adjustment.

A copy of the order obtained from the Commission, as above provided, shall be filed with the petition and made a part thereof.

* * * * *

SEC. 713. Immediately following the filing of the petition, there shall be convened a special court of three judges in the manner provided by section 266, as amended, of the Judicial Code, and thereafter all proceedings relative to such plan or any modification thereof shall be conducted before such court. Such three-judge court shall be vested with and shall exercise all the powers of a district court sitting in equity and all the powers as a court of bankruptcy necessary to carry out the intent and provisions of this chapter, including the classification of claims at such time and in such manner as the court may direct: *Provided, however,* That any one of the three judges constituting the special court who may be designated by the special court, may perform all functions, conduct all proceedings, and enter all orders, except that such single judge shall not hold a hearing for approval of a plan as provided in section 720 or for confirmation of a plan as provided in section 725 or enter the final decree. Any act of a single judge hereby permitted shall be subject to review by the special court on application by

any party in interest filed within thirty days after said act or by order of such court on its own motion made within such period of thirty days.

SEC. 714. The special court, after hearing, promptly shall enter an order approving the petition as properly filed under this chapter if satisfied that such petition complies with this chapter and has been filed in good faith, or dismissing such petition if not so satisfied.

SEC. 715. If the petition is approved by the special court, the said court, during the pendency of the proceedings under this chapter, shall have exclusive jurisdiction of the petitioner and of its property wherever located to the extent which may be necessary to protect the same against any action which might be inconsistent with said plan of adjustment or might interfere with the effective execution of said plan if approved by the court, or otherwise inconsistent with or contrary to the purposes and provisions of this chapter: *Provided, however,* That nothing herein contained shall be construed to authorize the court to appoint any trustee or receiver for said properties or any part thereof, or otherwise take possession of such properties or control the operation or administration thereof.

* * * * *

SEC. 722. If the United States or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the

United States, is a creditor or stockholder, the Secretary of the Treasury is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. If in any proceeding under this chapter the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in or claim against the debtor as creditor or stockholder), no plan which does not provide for the payment thereof shall be approved or confirmed by the court except upon the acceptance of a lesser amount or of a postponement by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall fail to accept or reject such lesser amount or such postponement for more than sixty days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed.

SEC. 725. If the special court shall find—

(1) that, at the time of the filing of said petition as provided in article III hereof, the proposed plan of adjustment had been assented to by not less than two-thirds of the aggregate amount of all claims of the petitioner affected by such plan, including at least a majority of the aggregate amount of claims of each such class;

(2) that the plan of adjustment as submitted or as modified by the court has been

accepted as submitted or, if modified, then as modified by or on behalf of creditors affected by such plan holding more than three-fourths of the aggregate amount of the claims affected by said plan, including at least three-fifths of the aggregate amount of the claims of each affected class;

(3) that the plan meets the requirements of clause (c), and the petitioner meets the requirements of clauses (a) and (b) of subparagraph (2) of the first sentence of section 710, and that the plan is fair and equitable as an adjustment and as such will: (a) afford due recognition to the rights of each class of creditors and stockholders and fair consideration to each class adversely affected and (b) will conform to the law of the land regarding the participation of the various classes of creditors and stockholders: *Provided,* That in making the findings required by this clause (3), the court shall scrutinize the facts independently of the extent of acceptances of such plan, and of any lack of opposition thereto, and of the fact that the Commission, under section 20a of the Interstate Commerce Act, has authorized the issuance or modification of securities as proposed by such plan, and of the fact that the Commission has made such or similar findings;

(4) that all corporate action required to authorize the issuance or modification of securities pursuant to such plan shall have been duly taken either before or since the enactment of this chapter;

(5) that the petitioner has not, in connection with said plan or the effectuation thereof, done any act or failed to perform any duty which act or failure would be a bar to the discharge of a bankrupt, and that the plan and the acceptance thereof are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act;

(6) that, after hearings for the purpose, all amounts or considerations, directly or indirectly paid or to be paid by or for the petitioner for expenses, fees, reimbursement, or compensation of any character whatsoever incurred in connection with the proceeding and plan, or preliminary thereto or in aid thereof, together with all the facts and circumstances relating to the incurring thereof, have been fully disclosed to the court so far as such amounts or considerations can be ascertained at the time of such hearings, that all such amounts or considerations are fair and reasonable, and to the extent that any such amounts or considerations are not then ascertainable, the same are to be so disclosed to the court when ascertained, and are to be subject to approval by the special court as fair and reasonable, and except with such approval no amounts or considerations covered by this clause (6) shall be paid; and

(7) that the provisions of sections 722, 736, and 737 of this chapter have been complied with.

Said court shall file an opinion setting forth its conclusions and the reasons therefor and shall enter a decree approving and con-

firming such plan and the adjustment provided thereby, which decree shall be binding upon the petitioner and upon all creditors and security holders of the petitioner; and thereafter the petitioner shall have full power and authority to and shall put into effect and carry out the plan and the orders of the special court relative thereto and issue the securities provided by the plan without further reference to or authority from the Commission or any other authority, State or Federal, except where required by any law relating to the Reconstruction Finance Corporation, and the rights of all creditors and security holders with respect to claims and securities affected by the plan shall be those provided by the plan as so approved and confirmed: *Provided, however,* That the title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the petitioner, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this chapter.

* * * * *

SEC. 726. After the special court shall have approved as properly filed a petition pursuant to article III hereof, the special court, from time to time during the pendency of the proceedings hereunder, may enjoin the institution of, or stay, for a reasonable time, any action or proceeding to enforce any right against the petitioner or its property based upon claims affected by the proposed plan of adjustment in any court, State or Federal,

whether for the enforcement of any such claim or for the appointment of receivers in equity or of the institution or prosecution of a proceeding under section 77 of the Bankruptcy Act or otherwise: *Provided, however,* That no such stay shall affect any proceeding based on or to enforce any claim which would be required to be paid if the plan of adjustment proposed by the petitioner were then in effect.

* * * * *

SEC. 736. In addition to the notices elsewhere expressly provided, the clerk of the court in which any proceedings under this chapter are pending shall forthwith transmit to the Secretary of the Treasury copies of—

(1) every petition filed under this chapter;

(2) the orders approving or dismissing petitions;

(3) the orders approving plans as filed or as modified, together with copies of such plans as approved;

(4) the decrees approving and confirming plans and the adjustments provided thereby, together with copies of such plans as approved;

(5) the injunctions or other orders made under section 726 of this chapter;

(6) the orders dismissing proceedings under this chapter; and

(7) such other papers filed in the proceedings as the Secretary of the Treasury may request or which the court may direct to be transmitted to him.

SEC. 737. Any order fixing the time for confirming a plan which affects claims or stock of the United States shall include a notice of not less than thirty days to the Secretary of the Treasury.

SEC. 738. The special court shall have power to determine the amount and legality of claims of the United States for taxes or customs duties, and to order payment thereof; and the order of the special court (provided for in section 714) approving the petition shall have the effect of an adjudication of bankruptcy of the petitioner for the purposes of section 274 of the Internal Revenue Code and the corresponding provisions of prior and subsequent revenue Acts. The running of the statute of limitations on the assessment or collection of any internal-revenue tax shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed.

* * * * *

SEC. 745. Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the applicable provisions of the Judicial Code.

SEC. 746. In the decree approving and confirming the plan the court may require such reports of the action taken by the petitioner thereunder in the execution of the plan as may be necessary to a final disposition of the cause,

and in its final decree disposing of the cause the court shall retain jurisdiction in the district court to the extent necessary to protect and enforce the rights of the parties under said plan and the orders of the court thereon.

* * * * *

SEC. 755. The jurisdiction conferred upon any court by this chapter shall not be exercised by such court after November 1, 1945, except in respect of any proceeding initiated by filing a petition under section 710 hereof on or before November 1, 1945.

Internal Revenue Code:

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General Rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U. S .C. 1946 ed., Sec. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return

should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. 1946 ed., Sec. 56.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is

made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U. S. C. 1940 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [As amended by Section 168 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceed-

ing or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

* * * * *

(c) *Failure to File Petition.*—If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. 1946 ed., Sec. 272.)

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate Assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory

or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

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(26 U. S. C. 1946 ed., Sec. 274.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

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(26 U. S. C. 1946 ed., Sec. 275.)

SEC. 729 [As added by Section 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

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(26 U. S. C. 1946 ed., Sec. 729.)

28 U. S. C.:

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be

sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rules of Civil Procedure:

Rule 60. Relief from Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

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